U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 April 2007

Case No: 2005-BLA-05298

In the Matter of:

J. T.,
Claimant

v.

CEDAR CITY ENERGIES,
Employer

KY COAL PRODUCERS S-I FUND,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

APPEARANCES:

Wes Addington, Esq.
For the Claimant

David H. Neeley, Esq.
For the Employer/Carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER – DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the "Act"). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

A formal hearing was held on behalf of J.D.T. ("Claimant"), represented by counsel, on October 25, 2006 in Pikeville, Kentucky. I afforded both parties the opportunity to offer testimony, question witnesses and introduce evidence. Thereafter, I closed the record. I based the following Findings of Fact and Conclusions of Law upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. Although the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformity with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, CX and EX refer to the exhibits of the Director, Claimant and Employer, respectively.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background

Claimant was born on January 25, 1954. (DX 2). Claimant has a sixth grade education. (DX 3). He is married to Z.T. (DX 2). Claimant claims to have worked seventeen years in coal mine employment. (DX 2). He last worked as a truck driver and at times as a roof-bolter. (Tr. 14). Claimant had to lift up to fifty pounds at times. (Tr. 15). He left the mines in 1986. (DX 2). Claimant has a history of lung cancer. (Tr. 17). Dr. Ammisetty treats Claimant for his lung condition. (Tr. 17). Claimant uses oxygen and an inhaler. (Tr. 18).

At the hearing, Claimant testified to smoking half a pack of cigarettes for ten years. (Tr. 18). However, on cross-examination he stated that he may have smoked a total of twenty-two yeas. (Tr.19). This statement is supported by the medical evidence in the record. I find that Claimant smoked half a pack of cigarettes per day for twenty-two years. Therefore, he has a smoking history of eleven pack-years.

Procedural History

Claimant filed his first application for Federal Black Lung benefits on September 16, 2002. (DX 2). The claim was denied by the District Director on October 31, 2003. (DX 21). Claimant then filed a request for modification on March 8, 2004; however, the District Director denied the request on May 25, 2004. (DX 31). Thereafter, Claimant filed another request for modification on July 1, 2004. The District Director denied the request. (DX 34). Claimant requested a hearing and the claim was transferred to the Office of Administrative Law Judges on October 28, 2004. (DX 35, 41).

Current Contested Issues

The parties contest the following issues regarding this claim:

1. Claimant's length of coal mine employment;

2. Whether Claimant has pneumoconiosis as defined by the Act and the regulations;

3. Whether Claimant's pneumoconiosis, if present, arose out of coal mine employment;

4. Whether Claimant is totally disabled;

5. Whether Claimant's total disability, if present, is due to pneumoconiosis;

6. Whether the evidence establishes a material change in conditions per 20 C.F.R. 725.310.

Employer also contests other issues that are identified at lines 18(b) on the list of issues. (DX 15). These issues are beyond the authority of an administrative law judge and are preserved for appeal.[1]

Dependency

Claimant alleged one dependent for the purposes of benefit augmentation. (DX 2). Claimant married Z.T. on June 30, 1972. (DX 2). The couple has no minor children. Accordingly, I find that Claimant has one dependent for the purposes of benefit augmentation.

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. The District Director made a finding of twelve years in coal mine employment. (DX 21, 31, 34). Claimant claims that he worked seventeen years in coal mine employment. (DX 2). At the hearing Employer stipulated to at least ten years. (Tr. 15). The evidence includes an employment questionnaire and Claimant's Social Security earnings report. (DX 3-6). Accordingly, based upon all the evidence in the record, I find that Claimant was a coal miner, as that term is defined by the Act and Regulations, for twelve years. He last worked in the Nation's coal mines in 1986. (DX 2).

Threshold Issue for Modification

Section 725.310 provides that a claimant, employer, or the district director may file a petition for modification within one year of the filing of the last denial of benefits. Modification petitions may be based upon a change in condition or a mistake in a determination of fact. 20

[1] These issues involve the constitutionality of the Act and the regulations. Administrative Law Judges are precluded from ruling on the constitutionality of the Act, and therefore, these issues will not be ruled on herein but are preserved for appeal purposes.

C.F.R. § 725.310(a). On July 1, 2004, the miner timely requested modification of the denial dated May 25, 2004.

In the prior denial, the District Director determined that Claimant did not prove any of the elements of entitlement. Claimant has submitted new evidence established since the prior denial. In a modification only the evidence dated after the prior denial is admissible to determine whether Claimant establishes a material change in condition. However, the entire record will be examined to determine whether a mistake of fact occurred in the prior proceedings.

A. Mistake of Fact

In deciding whether the prior decision contains a mistake in a determination of fact, I must review all the evidence of record, including evidence submitted since the most recent denial. New evidence, however, is not a prerequisite to modification based upon a mistake of fact. *Nataloni v. Director, OWCP*, 17 B.L.R. 1-82, 1-84 (1993). Rather, the fact finder is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971).

I have reviewed the previous denial, and I cannot locate any mistake of fact. Accordingly, I shall proceed with my analysis to determine if the newly submitted evidence establishes a change in condition.

B. Change in Conditions

Under the amended regulations of the Act, the progressive and irreversible nature of pneumoconiosis is acknowledged. 20 C.F.R. § 718.201(c). Consequently, claimants are permitted to offer recent evidence of pneumoconiosis after receiving a denial of benefits. *Id.* The new regulations provide that where a claimant files a subsequent claim or modification request after a prior claim has been finally denied, the claim must be denied on the grounds of the prior denial unless "Claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. § 725.309(d). If a claimant establishes the existence of an element previously adjudicated against him, only then must the administrative law judge consider whether all the evidence of record, including evidence submitted with the prior claim, supports a finding of entitlement to benefits. *Id.*

Accordingly, because Claimant's previous claim was denied, he now bears the burden of proof to show that one of the applicable conditions of entitlement has changed. 20 C.F.R. § 725.310(a). I must review the evidence developed and submitted subsequent to May 25, 2004, the date of the prior denial, to determine if he meets this burden. *Id.*

Newly Submitted Medical Evidence

Medical evidence submitted with a claim for benefits under the Act is subject to the requirement that it must be in "substantial compliance" with the applicable regulations' criteria for the development of medical evidence. *See* 20 C.F.R. §§ 718.101 to 718.107. The regulations address the criteria for chest x-rays, pulmonary function tests, physician reports, arterial blood gas studies, autopsies, biopsies and "other medical evidence." *Id.* "Substantial compliance" with the applicable regulations entitles medical evidence to probative weight as valid evidence.

Secondly, medical evidence must comply with the limitations placed upon the development of medical evidence. 20 C.F.R. § 725.414. The regulations provide that a party is limited to submitting no more than two chest x-rays, two pulmonary function tests, two arterial blood gas studies, one autopsy report, one biopsy report of each biopsy and two medical reports as affirmative proof of their entitlement to benefits under the Act. §§ 725.414(a)(2)(i), 725.414(a)(3)(i). However, since this is a modification of a prior denial of benefits each party is only entitled to one additional piece of evidence under each of the above categories.[2] Furthermore, any chest x-ray interpretations, pulmonary function test results, arterial blood gas study results, autopsy reports, biopsy reports and physician opinions that appear in one single medical report must comply individually with the evidentiary limitations. *Id.* In rebuttal to evidence propounded by an opposing party, a claimant may introduce no more than one physician's interpretation of each chest x-ray, pulmonary function test or arterial blood gas study. §§ 725.414(a)(2)(ii), 725.414(a)(3)(ii). Likewise, the District Director is subject to identical limitations on affirmative and rebuttal evidence. § 725.414(a)(3)(i-iii). Furthermore, since this is a modification only evidence dated after May 25, 2004 will be considered unless a material change in physical condition is proven. 20 C.F.R. § 725.309(d).

[2] At the hearing Employer attempted to submit two medical opinion reports into evidence and Claimant objected. Then in an order issued January 23, 2007, I ruled that Employer could only submit one of the reports into evidence under 20 C.F.R. 725.310(b). However, since this ruling the law on the subject has changed. In *Rose v. Buffalo Mining Company*, the Board held that if a party fails to submit two medical opinion reports as allowed under 20 C.F.R. § 725.414 in the original claim for benefits, the party can submit two reports in the modification proceedings. BRB No. 06-0207 BLA (Jan. 31, 2007). The Board reasoned that Section 725.310(b) provides for *additional evidence*, which the Board reasoned means in addition to the evidence allowed under Section 725.414. In this claim Employer only submitted the medical report of Dr. Fino in the original claim for benefits. Therefore, Employer is entitled to rely upon two medical reports in this claim. However, Dr. Broudy's December 20, 2005 opinion is still inadmissible because he based his opinion solely upon the evidence dated prior to the last denial of benefits. He did not take into consideration any of the new evidence. Also in Dr. Broudy's deposition testimony he only discusses the previously submitted evidence and therefore, it is also inadmissible.

A. X-ray Reports[3]

Exhibit[4]	Date of X-ray	Physician/Qualifications	Interpretation
CX 1	2/2/05	Forehand B-reader	1/1
EX 2	2/2/05	Halbert B-reader/BCR	0/0

B. Pulmonary Function Studies[5]

Exhibit/ Date[6]	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1 / FVC	Tracings	Comments
CX 1 2/2/05	Forehand	51/ 71"	2.23	4.21	50	53	Yes	Good cooperation and effort Pre-bronchodilator
			2.50	4.42	57	57		Post-bronchodilator

C. Blood Gas Studies[7]

Exhibit[8]	Date	Physician	pCO_2	pO_2	Resting/ Exercise
CX 1	2/2/05	Forehand	34	69	Resting
			36	73	exercise

D. Narrative Medical Evidence

Randolph Forehand, M.D., examined Claimant on February 2, 2005. (CX 1). Dr. Forehand performed a physical examination, arterial blood gas study, pulmonary function tests

[3] A chest x-ray may indicate the presence or absence of pneumoconiosis. 20 C.F.R. § 718.102(a) and (b). It is not utilized to determine whether the miner is totally disabled, unless complicated pneumoconiosis is indicated wherein the miner may be presumed to be totally disabled due to the disease.

[4] Claimant also submitted chest x-ray readings by Dr. Miller. These readings are of chest x-rays taken prior to the date of the last denial. Therefore, they are not admissible as evidence. Claimant must first prove a material change in condition with new evidence and a chest x-ray taken prior to the date of the last denial cannot be used to prove a change in condition. Therefore, Employer's rebuttal evidence by Dr. Halbert is also inadmissible.

[5] The pulmonary function study, also referred to as a ventilatory study or spirometry, indicates the presence or absence of a respiratory or pulmonary impairment. 20 C.F.R. § 718.104(c). The regulations require that this study be conducted three times to assess whether the miner exerted optimal effort among trials, but the Benefits Review Board (the "Board") has held that a ventilatory study which is accompanied by only two tracings is in substantial compliance with the quality standards at Section 718.204(c)(1). *Defore v. Alabama By-Products Corp*., 12 B.L.R. 1-27 (1988). The values from the FEV_1 as well as the MVV or FVC must be in the record, and the highest values from the trials are used to determine the level of the miner's disability.

[6] The pulmonary function testing performed by Drs. Fino and Ammisetty are inadmissible since they were performed prior to the date of the last denial of benefits.

[7] Blood-gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. 20 C.F.R. § 718.105(a).

[8] The arterial blood gas studies performed by Drs. Fino and Ammisetty are inadmissible since they were performed prior to the date of the last denial of benefits.

and a chest x-ray. He recorded a coal mine employment history of sixteen years and a smoking history of thirty-three years. Dr. Forehand noted that Claimant has a history of lung cancer. Claimant's symptoms included shortness of breath and chest pain. Dr. Forehand stated that Claimant informed him that "he would be unable to return to his last coal mining job because the physical demands of a scoop operator and the dusty conditions left him breathless and with insufficient physical stamina to perform the duties of his job as a scoop operator." Upon physical examination Dr. Forehand noted inspiratory crackles at the lung bases but no wheezes. Claimant's arterial blood gas studies revealed no arterial hypoxemia. However, based upon Claimant's testing Dr. Forehand opined that Claimant is totally disabled due to his respiratory condition. Dr. Forehand related Claimant's total disability to coal dust exposure, smoking, lung cancer and the removal of the lower lobe of Claimant's right lung. He did not state the basis of this opinion. Dr. Forehand also diagnosed Claimant with smoker's bronchitis and pneumoconiosis based upon the chest x-ray evidence. (CX 1).

B.T. Westerfield, M.D. provided a consultative report written September 5, 2006. (EX 4). Dr. Westerfield examined the medical evidence in the record to formulate his conclusions. He opined that based upon the majority of the chest x-ray readings that Claimant does not have clinical pneumoconiosis. While Dr. Westerfield agreed that Claimant has had adequate exposure to coal dust to cause pneumoconiosis, he stated that the evidence does not support an opinion that his condition is related to the exposure. He stated that the condition is related to smoking since Claimant's symptoms only developed in the last few years and the fact that Claimant continued to smoke after leaving the mines. He also based his opinion upon the chest x-ray data and the pulmonary function testing. Dr. Westerfield found no evidence of fibrosis of the lung tissue. However, he diagnosed Claimant with an obstructive lung disease related to smoking based upon the pulmonary function testing. Dr. Westerfield relates Claimant's respiratory symptoms and pulmonary impairment to smoking. He further opined that Claimant's impairment does not prevent him from being able to perform his last coal mine employment. He found no pulmonary disability. (EX 4).

DISCUSSION AND APPLICABLE LAW

Because Claimant filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, Claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. § 725.202(d)(2)(i-iv). Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989).

Pneumoconiosis and Causation

Section 718.202 provides four means by which pneumoconiosis may be established: chest x-ray, biopsy or autopsy, presumption under Sections 718.304, 718.305 or 718.306, or if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in Section 718.201. 20 C.F.R. § 718.202(a). The

regulatory provisions at 20 C.F.R. § 718.201 contain a definition of "pneumoconiosis" provided as follows:

> (a) For the purposes of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical," pneumoconiosis and statutory, or "legal," pneumoconiosis.
>
> (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

§ 718.201(a).

It is within the administrative law judge's discretion to determine whether a physician's conclusions regarding pneumoconiosis are adequately supported by documentation. *Lucostic v. United States Steel Corp*., 8 B.L.R. 1-46, 1-47 (1985). "An administrative law judge may properly consider objective data offered as documentation and credit those opinions that are adequately supported by such data over those that are not." *See King v. Consolidation Coal Co*., 8 B.L.R. 1-262, 1-265 (1985).

A. X-ray Evidence

Under Section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(*en banc*); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). As noted above, I also may assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP,* 12 B.L.R. 1-6 (1988); *Clark*, 12 B.L.R. 1-149 (1989).

The record only includes only two chest x-ray readings that are admissible in this claim for modification. The readings do not support a finding of pneumoconiosis. Dr. Forehand, a B-reader found the February 2, 2005 x-ray film positive for pneumoconiosis; however, Dr. Halbert, a Board-certified radiologist and B-reader interpreted the film as negative. Therefore, based upon Dr. Halbert's superior qualifications, I find this x-ray negative. Accordingly, pneumoconiosis has not been established under Section 781.202(a)(1) by a preponderance of the evidence.

B. Autopsy/Biopsy

Pursuant to Section 718.202(a)(2), a claimant may establish the existence of pneumoconiosis by biopsy or autopsy evidence. As no biopsy or autopsy evidence exists in the record, this section is inapplicable in this case.

C. Presumptions

Section 718.202(a)(3) provides that it shall be presumed that the miner is suffering from pneumoconiosis if the presumptions described in Sections 718.304, 718.305, or 718.306 are applicable. Section 718.304 is not applicable in this case because there is no evidence of complicated pneumoconiosis. Section 718.305 does not apply because it pertains only to claims that were filed before January 1, 1982. Finally, Section 718.306 is not relevant because it is only applicable to claims of miners who died on or before March 1, 1978.

D. Medical Opinions

Section 718.202(a)(4) provides another way for a claimant to prove that he has pneumoconiosis. Under Section 718.202(a)(4), a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion might support the presence of the disease if it is supported by adequate rationale, notwithstanding a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 9 B.L.R. 1-22, 1-24 (1986). The weight given to a medical opinion will be in proportion to its well-documented and well-reasoned conclusions.

A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 B.L.R. 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984); *Buffalo v. Director*, OWCP, 6 B.L.R. 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp*., 2 B.L.R. 1-130 (1979).

A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(*en banc*).

Dr. Forehand concluded that Claimant suffers from clinical pneumoconiosis based solely upon the chest x-ray data. In *Cornett v. Benham Coal Inc.*, 227 F.3d 569 (6th Cir. 2000), the Sixth Circuit Court of Appeals intimated that such bases alone do not constitute sound medical judgment under Section 718.202(a)(4). *Id.* at 576. The Board has also held permissible the discrediting of physician opinions amounting to no more than x-ray reading restatements. *See Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-110 (1993)(*citing Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-113 (1989), and *Taylor v. Brown Badgett, Inc.*, 8 B.L.R. 1-405 (1985)). In *Taylor*, the Board explained that the fact that a miner worked for a certain period of time in the coal mines alone does not tend to establish that he has any respiratory disease arising out of coal mine employment. *Taylor*, 8 B.L.R. at 1-407. The Board went on to state that, when a doctor relies solely on a chest x-ray and a coal dust exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his or her opinion "merely a reading of an x-ray... and not a reasoned medical opinion." *Id*.

Acknowledging that Dr. Forehand performed other physical and objective testing, he listed that he expressly relied on Claimant's positive x-ray and coal dust exposure for his clinical determination of pneumoconiosis. Moreover, he failed to state how the results from his other objective testing might have impacted his diagnosis of pneumoconiosis. As he does not indicate any other reasons for his diagnosis of pneumoconiosis beyond the x-ray and exposure history, I find his report unreasoned with respect to a diagnosis of clinical pneumoconiosis. In Addition, Dr. Forehand diagnosed Claimant with smoker's bronchitis and an obstructive defect but he did not relate the conditions to coal dust exposure; therefore, these diagnoses do not constitute legal pneumoconiosis.

In contrast, Dr. Westerfield opined that Claimant does not suffer from clinical or legal pneumoconiosis. Although he agreed that Claimant's coal dust exposure was sufficient to cause his condition, he related the condition to smoking. He based his opinion upon the chest x-ray data and the objective testing in the record. I find his opinion well-reasoned and well-documented.

I have considered all the evidence under Section 718.202(a); and I find the probative negative x-ray report and the complete, comprehensive and supported medical opinion report of Dr. Westerfield outweighs the other contrary evidence of record. Thus, I find Claimant has failed to demonstrate, by a preponderance of the evidence, the existence of pneumoconiosis.

Causation of Pneumoconiosis

Once it is determined that a claimant suffers from pneumoconiosis, it must be determined whether Claimant's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). The burden is upon Claimant to demonstrate by a preponderance of the

evidence that his/her pneumoconiosis arose out of his coal mine employment. 20 C.F.R. § 718.203(b) provides:

> If a miner who is suffering or has suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arouse out of such employment.

Id.

Since I have found that Claimant failed to prove that he has pneumoconiosis, the issue of whether pneumoconiosis arose out of his employment in the coal mines is moot.

Total Disability

The determination of the existence of a totally disabling respiratory or pulmonary impairment shall be made under the provisions of Section 718.204. A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(1). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 B.L.R. 1-11, 1-15 (1991). A claimant can be considered totally disabled if the irrebuttable presumption of Section 718.304 applies to his claim. If, as in this case, the irrebuttable presumption does not apply, a miner shall be considered totally disabled if in absence of contrary probative evidence, the evidence meets one of the Section 718.204(b)(2) standards for total disability. The regulation at Section 718.204(b)(2) provides the following criteria to be applied in determining total disability: 1) pulmonary function studies; 2) arterial blood gas tests; 3) a cor pulmonale diagnosis; and/or, 4) a well-reasoned and well-documented medical opinion concluding total disability. Under this section, I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike evidence, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1987).

A. Pulmonary Function Tests

Under Section 718.204(b)(2)(i) total disability may be established with qualifying pulmonary function tests.[9] To be qualifying, the FEV_1 as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1- 154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7

[9]A qualifying pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i) and (ii). A non-qualifying test produces results that exceed the table values.

B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984). Also, little or no weight may be accorded to a ventilatory study where the miner exhibited a poor cooperation or comprehension. *See, e.g., Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984).

The record includes only one admissible pulmonary function test. The testing produced qualifying results pre-bronchodilator and non-qualifying results post-bronchodilator. Therefore, Claimant showed improvement with the use of a bronchodilator. Accordingly, I find per Section 178.204(b)(2)(i), Claimant has not established total disability by a preponderance of the evidence.

B. Blood Gas Studies

Under Section 718.204(b)(2)(ii) total disability may be established with qualifying arterial blood gas studies. All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner or circumstances surrounding the testing affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (miner was intoxicated).

The arterial blood gas studies of record did not produce qualifying results. Accordingly, I find per Section 178.204(b)(2)(I,), Claimant has failed to establish total disability.

C. Cor Pulmonale

There is no medical evidence of cor pulmonale in the record, I find Claimant failed to establish total disability with medical evidence of cor pulmonale under the provisions of Section 718.204(b)(2)(iii).

D. Medical Opinions

The final way to establish a totally disabling respiratory or pulmonary impairment under Section 718.204(b)(2) is with a reasoned medical opinion. The opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. *Id*. A claimant must demonstrate that his respiratory or pulmonary condition prevents him from engaging in his "usual" coal mine employment or comparable and gainful employment.
20 C.F.R. § 718.204(b)(2)(iv).

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. In assessing total disability under Section 718.204(b)(2)(iv), the administrative law judge, as the fact-finder, is required to compare the exertional requirements of

Claimant's usual coal mine employment with a physician's assessment of Claimant's respiratory impairment. *Budash v. Bethlehem Mines Corp.*, 9 B.L.R. 1-48, 1-51 (holding medical report need only describe either severity of impairment or physical effects imposed by claimant's respiratory impairment sufficiently for administrative law judge to infer that claimant is totally disabled). Once it is demonstrated that the miner is unable to perform his or her usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform comparable and gainful work pursuant to Section 718.204(c)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

The physicians' reports are summarized above. In summary, Dr. Forehand opined that Claimant is totally disabled and unable to perform his last coal mine employment as a scoop operator. He bases his opinion upon a statement by Claimant stating that he would be unable to perform the job and the objective testing. However, Dr. Forehand fails to explain opinion despite Claimant's improvement with the use of a bronchodilator. Therefore, I give his opinion less weight.

Dr. Westerfield opined that Claimant has no pulmonary impairment. He based his opinion upon the non-qualifying pulmonary function and arterial blood gas studies. However, Dr. Westerfield did not discuss the exertional requirements of Claimant's employment. Therefore, I give his opinion less weight.

Accordingly, I find Claimant has failed to establish total disability by a preponderance of the probative medical opinion reports under the provisions of Subsection 718.204(b)(2)(iv).

E. Overall Total Disability Finding

Upon consideration of all of the evidence of record, I find that Claimant has not established, by a preponderance of the evidence, total disability. Accordingly, I find Claimant has not established total disability under the provisions of Section 718.204(b).

Total Disability Due to Pneumoconiosis

Since I have found that Claimant failed to prove total disability, the issue of whether total disability is due to pneumoconiosis is moot.

Change in Condition

Accordingly, since Claimant has failed to prove pneumoconiosis, total disability or total disability due to pneumoconiosis, he has failed to establish a material change in condition. Therefore, I will not reopen the record.

ENTITLEMENT

In sum, the newly submitted evidence does not establish a material change in condition. Claimant has not met any of the conditions of entitlement. Therefore, J.T.'s claim for benefits under the Act shall be denied.

Attorney's Fees

The award of attorney's fees, under this Act, is permitted only in cases in which Claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to Claimant for the representation services rendered to him in pursuit of the claim

ORDER

IT IS HEREBY ORDERED that the claim of J.T. for benefits under the Black Lung Benefits Act is hereby DENIED.

A

JOSEPH E. KANE
Administrative Law Judge

Notice of Appeal Rights: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with Board within thirty (30) days from the date of which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* C.F.R §802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).